

Can Asbestos Removers Assume the Risk in Ohio?: *Cremeans v. Willmar Henderson Mfg. Co.*¹

I. INTRODUCTION

Between 1940 and the early 1970s, producers used asbestos² in over 3000 products commonly found in residential, commercial, and public buildings.³ Such products included: "floor tile, textile fireproofing, insulation, ceiling tile, building panels, plaster and stucco."⁴ Despite the fact that the dangers of exposure to asbestos date back 2000 years,⁵ public concern was not aroused until the 1973 case of *Borel v. Fibreboard Paper Products Corp.*⁶ This same year, the United States Environmental Protection Agency started curtailing the use of asbestos.⁷ The curtailment trend has culminated in the current laws and regulations requiring asbestos abatement.⁸ This Comment will focus on assumption of the risk and asbestos removers, those workers whose employment resulted from the enactment of laws and regulations that require asbestos abatement⁹ generally, and in the most extreme situations, asbestos removal.¹⁰

¹ 566 N.E.2d 1203 (Ohio 1991).

² "Asbestos" is defined as "a group of naturally occurring minerals that separate into fibers of high tensile strength, are resistant to heat, wear, and chemicals, including, but not limited to, chrysotile, amosite, crocidolite, actinolite, tremolite, anthophyllite and their manufactured asbestiform materials." OHIO REV. CODE ANN. § 3710.01(A) (Anderson 1988).

³ Barbara Christensen and Kristine Larscheid, *Asbestos Abatement: The Second Wave of the Asbestos Litigation Industry*, 27 WASHBURN L.J. 454, 456 (1988).

⁴ *Id.*

⁵ *Id.* at 454.

⁶ 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). This case marked the first successful action brought by an insulation worker against an asbestos insulation manufacturer. *See* Christensen and Larscheid, *supra* note 3, at 457 n.26. The Fifth Circuit broke with all prior precedent by refusing to accept the manufacturer's state of the art defense. *Id.*

⁷ Christensen and Larscheid, *supra* note 3, at 458; Melissa Zelen, *Products Liability Issues in School Asbestos Litigation*, 10 AM. J.L. & MED. 467, 471 (1984-85).

⁸ *See* 20 U.S.C. §§ 4011-22 (1988); *see also* OHIO REV. CODE ANN. § 3710.01 (Anderson 1988). For a more detailed discussion of the trend leading up to the current laws and regulations governing asbestos abatement, *see* Zelen, *supra* note 7, at 471-72.

⁹ The major types of abatement are encapsulation, enclosure, and removal. Christensen and Larscheid, *supra* note 3, at 458.

¹⁰ Removal is the only permanent method of abatement, but also the most expensive. *Id.*

Part II of this paper will set the legal stage for the *Cremeans* decision by exploring strict products liability law and defenses in Ohio. Part III will provide the historical roots of the assumption of the risk defense. Part IV will focus on the Ohio Supreme Court's decision in *Cremeans v. Willmar Henderson Mfg. Co.* and its progeny, which arguably eliminated the availability of the defense of assumption of the risk in the employment setting. Part V will explore the various elements of the assumption of the risk defense. Part VI will apply these elements and the *Cremeans* decision to the asbestos remover and conclude that an asbestos remover cannot assume the risk of contracting asbestosis or a related disease in the normal performance of his or her employment.

II. STRICT PRODUCTS LIABILITY LAW AND DEFENSES IN OHIO

Nationally, strict products liability law evolved out of contract and negligence law. Ohio first recognized a strict products liability action in the seminal case of *Rogers v. Toni Home Permanent Co.*¹¹

From *Rogers*, the Supreme Court of Ohio further extended the doctrine of strict products liability,¹² culminating in the court's formal adoption in 1977 of section 402A of the *Restatement (Second) of Torts* as the law of Ohio.¹³

¹¹ 147 N.E.2d 612 (Ohio 1958).

¹² See *Lonzrick v. Republic Steel Corp.*, 218 N.E.2d 185 (Ohio 1966).

¹³ *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 271 (Ohio 1977). The *Restatement* provides:

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
2. The rule stated in subsection one applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). The section imposes liability even where the manufacturer has exercised "all possible care in the preparation and sale of his product."

Four years later, in *Leichtamer v. American Motors Corp.*,¹⁴ the court applied section 402A strict liability to products defectively designed, in addition to those suffering from a manufacturing defect.¹⁵ According to the court, a product is “defectively designed” if it fails the “consumer expectation test,” namely, the product is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.¹⁶

The court subsequently extended the concept of a “defectively designed” product by creating a second test for defective design in *Knitz v. Minster Machine Co.*¹⁷ Specifically, the court held that “a product design is in a defective condition if it is more dangerous than an ordinary consumer would expect . . . or if the benefits of the challenged design do not outweigh the risk inherent in such design.”¹⁸ Thus, if a product fails either the “consumer expectation test” or the “risk/benefit test,” it is considered “defectively designed” and the manufacturer will be held strictly liable.

More recently, the Ohio Supreme Court in *Crislip v. TCH Liquidating Co.*,¹⁹ imposed strict products liability on a manufacturer of an “unreasonably dangerous” or “unavoidably unsafe” product when the manufacturer fails to warn or inadequately warns of the dangerous condition of the product.²⁰

In 1988, the Ohio General Assembly codified much of the existing common law by enacting Ohio’s Tort Reform Act, which added sections 2307.71 through 2307.80 and 2315.20 to the Ohio Revised Code. A scholar in the field provided commentary on Ohio’s Tort Reform and stated that,

a substantial body of law had developed, largely consistent from court to court and from year to year. It was in this context that [tort reform] . . . was enacted, thereby for the first time *codifying all causes of action and defenses* in most product liability cases which arise on or after January 5, 1988.²¹

¹⁴ 424 N.E.2d 568 (Ohio 1981).

¹⁵ *Id.* at 577.

¹⁶ *Id.*

¹⁷ 432 N.E.2d 814 (Ohio), *cert. denied*, 459 U.S. 857 (1982).

¹⁸ *Id.* at 818 (emphasis added).

¹⁹ 556 N.E.2d 1177 (Ohio 1990).

²⁰ *Id.* at 1183.

²¹ JAMES LOWE, PRODUCT LIABILITY IN OHIO AFTER TORT REFORM 25 (1988) (emphasis added).

In essence, the Ohio legislature codified the existing common law.

For example, in Ohio Revised Code section 2307.75, which governs the risk/benefit and consumer expectation tests, the legislature enacted the rule of *Knitz v. Minster Machine Co.*, providing that:

[A] product is defective in design or formulation if either of the following applies:

(1) When it left the control of its manufacturer, the foreseeable risks associated with its design or formulation . . . exceeded the benefits associated with that design or formulation . . . ;

(2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.²²

Additionally, section 2307.76 of the Ohio Revised Code addresses defective products due to inadequate warnings or instructions, codifying *Crislip*.²³

²² OHIO REV. CODE ANN. § 2307.75(A)(1), (2) (Anderson 1988).

²³ Section 2307.76 reads as follows:

(A) Subject to divisions (B) and (C) of this section, a product is defective due to inadequate warning or instruction if *either* of the following applies:

(1) It is defective due to inadequate warning or instruction at the time of marketing if, when it left the control of its manufacturer, *both* of the following applied:

(a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused the harm for which the plaintiff seeks to recover compensatory damages;

(b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

(2) It is defective due to inadequate post-marketing warning or instruction if, at a relevant time after it left the control of its manufacturer, *both* of the following applied:

(a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;

When confronted with a claim of strict products liability, a manufacturer may assert two general defenses. First, a manufacturer may argue that the plaintiff "misused the product in an unforeseeable manner."²⁴ Second, a manufacturer may prove that the plaintiff "voluntarily and knowingly assumed the risk occasioned by the defect."²⁵ Moreover, although a manufacturer may assert contributory or comparative negligence,²⁶ the manufacturer should argue it in terms of the plaintiff's implied assumption of the risk because the Ohio Supreme Court has ruled that, "[the] principles of comparative negligence . . . have no application to a products liability case based upon strict liability in tort."²⁷

Section 2315.20 of the Ohio Revised Code addresses the defense of assumption of the risk and provides that:

Express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim . . . and if it is determined that the claimant expressly or impliedly assumed a risk and that such express or implied assumption was a direct and proximate cause of harm for which the claimant seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages.²⁸

This Comment will focus exclusively on implied assumption of the risk.²⁹

(b) The manufacturer failed to provide the post-marketing warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

OHIO REV. CODE ANN. § 2307.76 (Anderson 1988) (emphasis added).

²⁴ *Menifee v. Ohio Welding Products, Inc.*, 472 N.E.2d 707, 711 (Ohio 1984).

²⁵ See *Bowling v. Heil Co.*, 511 N.E.2d 373, 377 (Ohio 1987); RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

²⁶ Ohio now recognizes comparative negligence. See OHIO REV. CODE ANN. § 2315.19 (Anderson 1988).

²⁷ *Bowling*, 511 N.E.2d at 380.

²⁸ OHIO REV. CODE ANN. § 2315.20(B)(1), (2) (Anderson 1988) (codifying *Onderko v. Richmond Mfg. Co.*, 511 N.E.2d 388 (Ohio 1987)).

²⁹ Express assumption of the risk occurs when "[a] plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm" RESTATEMENT (SECOND) OF TORTS § 496B (1965). See, e.g., *Baker Pac. Corp. v. Suttles*, 269 Cal. Rptr. 709, 711 (Ct. App. 1990) (The employer required asbestos removers to sign a release before beginning a job, in which the remover "knowingly assume[d] all risks in connection with potential exposure to asbestos," and "waive[d] and relinquish[ed] any and all claims of every nature . . . which

Implied assumption of the risk occurs when the plaintiff does not "expressly consent to accept the risk; but by voluntarily electing to proceed with knowledge of the risk in a manner which will expose him to it, he manifests a willingness to accept [the risk] . . . [and] therefore [is] barred from recovery" ³⁰ There are two types of implied assumption of the risk—primary and secondary.³¹

Implied primary assumption of the risk "occurs when either the defendant is not negligent" or when the defendant did not owe a duty to the plaintiff or did not breach an owed duty.³² This Comment will not deal with implied primary assumption of the risk, rather, it will examine implied secondary assumption of the risk.

Implied secondary assumption of the risk "occurs when the plaintiff voluntarily encounters a known risk of harm created by the defendant's negligence."³³ In the case of defective products, the defendant manufacturer is "negligent" because it has breached its duty of providing the consumer with a product that lives up to the "consumer's expectations" and in which its "risks outweigh its benefits." Consequently, "[s]ince the negligence of the defendant has been established, [implied] secondary assumption of the risk is an affirmative defense."³⁴

Implied secondary assumption of the risk is broken down further into reasonable and unreasonable assumption of the risk.³⁵ The focus of this paper will be on the latter, unreasonable assumption of the risk.³⁶ Unreasonable implied secondary assumption of the risk "occurs when the plaintiff voluntarily but unreasonably decides to proceed in the face of a known risk created by the defendant's negligent conduct."³⁷ In *Cremeans*,

are in any way, directly or indirectly, related to exposure to asbestos and asbestos-containing materials." Although this release was ruled invalid by the court, it provides an excellent example of an employer's attempt to obtain a statement of its employees' express assumption of the risk.).

³⁰ RESTATEMENT (SECOND) OF TORTS § 496C cmt. b (1965).

³¹ Matthew J. Toddy, Case Comment, *Assumption of the Risk Merged with Contributory Negligence: Anderson v. Ceccardi*, 45 OHIO ST. L.J. 1059, 1062 (1984) (citing *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959)).

³² *Id.* at 1062.

³³ *Id.* at 1063.

³⁴ *Id.*

³⁵ *Id.* (citing Fleming James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 188-89 (1968)).

³⁶ "Reasonable" assumption of the risk has been the subject of much debate because it turns on whether the court should deny recovery to a plaintiff who has acted reasonably (the law generally encourages reasonable behavior) "solely because the plaintiff voluntarily incurred a known risk." Toddy, *supra* note 31, at 1064.

³⁷ *Id.* (citing *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 95 (N.J. 1959)).

the Supreme Court of Ohio was specifically referring to unreasonable implied secondary assumption of the risk when it held that “[a]n employee does not voluntarily or *unreasonably* assume the risk of injury which occurs in the course of his or her employment when that risk must be encountered in the normal performance of his or her required job duties and responsibilities.”³⁸

III. THE HISTORICAL ROOTS OF THE ASSUMPTION OF THE RISK DEFENSE

One of the reasons the *Cremeans* court ruled that assumption of the risk is not a valid defense for a manufacturer when the injured user is an employee who encounters the defective product “in the normal performance of his or her required job duties and responsibilities”³⁹ can be traced to the historical roots of the defense. The court opined that the historical purpose of the doctrine of assumption of the risk, which was to keep “human overhead” down to fuel industrial growth, has been undercut.⁴⁰ Specifically, the court stated that

[t]he defense of assumption of the risk is a product of laissez-faire economics . . . [and] was judicially developed . . . to insulate the employer as much as possible from bearing the human overhead which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry.⁴¹

The rationale of “keeping down human overhead” is most evident in the United States Supreme Court case of *Tuttle v. Milwaukee Ry.*,⁴² decided in 1887. In *Tuttle*, the Court ruled that a railroad worker assumed the risk of his injury because

the servant, when he engages in [a particular] employment, does so in view of all the incidental hazards, and that he and the employer, when making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing upon their stipulations.⁴³

³⁸ *Cremeans v. Willmar Henderson Mfg. Co.*, 566 N.E.2d 1203, 1207 (Ohio 1991) (emphasis added).

³⁹ *Id.*

⁴⁰ *Id.* at 1205–06.

⁴¹ *Id.* (quoting *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 59 (1943)).

⁴² 122 U.S. 189 (1887).

⁴³ *Id.* at 195.

This philosophy resulted in the typical scenario of a worker being injured on the job by a defective product, the manufacturer asserting that the worker had "assumed the risk" of injury, and the courts agreeing with the manufacturer. Consequently, the worker was forced to absorb the cost of his or her injury alone. This kept the cost of the product low and allowed industry to flourish at the expense of the injured worker.

With regard to occupational diseases, commentators simply applied the *Tuttle* Court's rationale and explained the theory as follows: "[I]n a fully competitive employment market, market transactions between employers and employees could lead to efficient levels of health hazards and equitable compensation for diseased workers. Workers will not accept jobs posing known risks, unless the position offers some additional, attractive offsetting feature."⁴⁴

In reality, however, this philosophy provided a catalyst for industrial growth at the expense of workers' lives and health while also creating an incentive for employers (and manufacturers) to conceal or not seek out knowledge of dangers. In terms of asbestos-related diseases specifically, "the problems of the latency factor and tracing environmental causes of the disease"⁴⁵ led "workers [to] fail to demand an adequate wage premium for the risk, and employers [to] provide too little control of health risks."⁴⁶ Therefore, legislatures passed workers' compensation laws and courts began to impose strict products liability, which allowed the injured worker to recover above and beyond the allotments provided by workers' compensation.⁴⁷

IV. *CREMEANS V. WILLMAR HENDERSON MFG. CO.*⁴⁸ AND ITS PROGENY

The defendant manufacturer, Willmar Henderson Manufacturing Co., sold a loader without its protective cage to the defendant employer, Sohio Chemical Co.⁴⁹ Sohio employed the plaintiff, Michael Cremeans, to operate the Willmar loader in fertilizer bins to scoop out fertilizer for hauling elsewhere.⁵⁰ Cremeans knew that "fertilizer avalanches"

⁴⁴ W. Kip Viscusi, *Compensating Workplace Toxic Torts*, 37 ACAD. POL. SCI. 126, 127 (1988).

⁴⁵ *Id.* at 128.

⁴⁶ *Id.*

⁴⁷ See Paul Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and Non-Tort Regime*, 50 OHIO ST. L.J. 825 (1989).

⁴⁸ 566 N.E.2d 1203 (Ohio 1991).

⁴⁹ *Id.* at 1204.

⁵⁰ *Id.*

occasionally occurred and expressed concern that a loader without a cage would leave the operator unprotected.⁵¹ Nonetheless, he continued to operate the loader because "it was his job."⁵² On one occasion, while Cremeans' loader was inside a bin scooping out fertilizer, the fertilizer poured out onto the front end of the loader, which resulted in injury to Cremeans.⁵³ If the loader had been equipped with a protective cage, Cremeans would not have been injured.⁵⁴

The court held that "[a]n employee does not voluntarily or unreasonably assume the risk of injury which occurs in the course of his or her employment when that risk must be encountered in the normal performance of his or her job duties and responsibilities."⁵⁵

As explained in Part III above, the court opined that the historic purpose underlying the doctrine of assumption of the risk, which was to keep down "human overhead" to fuel industrial growth, has been undercut.⁵⁶

The court further reasoned that "an employee must either accept the dangers of his or her job or face the prospect of finding new employment in an economic setting where the supply of work has become increasingly limited."⁵⁷ Moreover, the court recognized that an Ohio appellate court, in *Prentiss v. Kirtz*, decided to bar assumption of the risk as a valid defense in the context of claims for injury on the job as far back as 1977.⁵⁸

In addition, many other courts, including state high courts, have persuasively disallowed assumption of the risk under similar circumstances.⁵⁹ Therefore, the Supreme Court of Ohio abolished the

⁵¹ *Id.* at 1205.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1207.

⁵⁶ *Id.* at 1205-06.

⁵⁷ *Id.* at 1207.

⁵⁸ *Prentiss v. Kirtz*, 374 N.E.2d 429 (Ohio Ct. App. 1977). The defense assumption of the risk has also been abandoned in negligence actions. *See Anderson v. Ceccardi*, 451 N.E.2d 780 (Ohio 1983); *Hirschback v. Cincinnati Gas & Elect. Co.*, 452 N.E.2d 326 (Ohio 1983).

⁵⁹ *Beacham v. Lee-Norse*, 714 F.2d 1010, 1014-15 (10th Cir. 1983); *Rhoads v. Service Mach. Co.*, 329 F. Supp. 367, 381 (E.D. Ark. 1971); *Kitchens v. Winter Co. Bldrs.*, 289 S.E.2d 807, 809 (Ga. Ct. App. 1982); *Scott v. Dreis & Krump Mfg. Co.*, 326 N.E.2d 74, 87 (Ill. App. Ct. 1975)); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 148 (N.J. 1979); *Cremeans v. Willmar Henderson Mfg. Co.*, 566 N.E.2d 1203, 1207 (Ohio 1991) (citing *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 140-41 (Or. 1976)); *Brown v. Quick Mix Co.*, 454 P.2d 205, 208 (Wash. 1969).

assumption of the risk defense in the employment setting.⁶⁰ It did so as a policy decision to further modern economic and social philosophies concerning employer/employee relationships, to be consistent with relevant Ohio case law, and to join the prevailing view expressed by other state high courts.

Since the *Cremeans* decision, Ohio courts have applied the holding almost uniformly. In *Kukay v. Crown Controls Corp.*,⁶¹ the Sixth Appellate District ruled that the plaintiff-worker could not assume the risk of injuries resulting from a defective forklift he was operating in the course of his job duties and responsibilities.⁶²

The Third Appellate District has been the most active in interpreting the *Cremeans* decision. In *Ball v. M.R. Philipot Masonry Co.*,⁶³ the first decision following *Cremeans*, the court ruled assumption of the risk unavailable as a defense when unattended and unsecured bricks fell on the plaintiff-pipefitter. In *Sigman v. General Electric Co.*,⁶⁴ the court dealt with defective products that resulted in the death of an electric-line repair person. The court adopted and *extended Cremeans* in holding "assumption of the risk by an injured employee to be no defense for the manufacturer in a products liability case brought by the employee for recovery for injuries claimed to have been proximately caused by a defective product used in the performance of the employee's required job duties, *even in the case of inherently dangerous job duties.*"⁶⁵

The only Ohio court to limit *Cremeans* was the Court of Appeals for Tuscarawas County in *Syler v. Signode Corp.*⁶⁶ In *Syler*, the plaintiff was a maintenance worker whose job duties included performing routine maintenance on a brick-packaging machine.⁶⁷ On the occasion at issue, the plaintiff-worker sustained injuries while attempting to repair the machine. Specifically, the plaintiff-worker entered the interior of the machine and yelled to one of his co-workers to turn off the machine's power so that the bricks could be safely realigned.⁶⁸ While the plaintiff-worker was attempting to realign the bricks, the machine began moving and "pinched

⁶⁰ The *Cremeans* court noted, however, that "an employee may voluntarily and unreasonably encounter a known risk when the employee *intentionally* causes his or her own injury." *Cremeans*, 566 N.E.2d at 1207 n.2 (emphasis added).

⁶¹ No. S-90-7, 1991 Ohio App. LEXIS 5178 (6th Dist. Oct. 25, 1991).

⁶² *Id.* at 5178, *13.

⁶³ No. 17-90-4, 1991 Ohio App. LEXIS 1625 (3d Dist. Apr. 10, 1991).

⁶⁴ 602 N.E.2d 711 (Ohio Ct. App. 1991).

⁶⁵ *Id.* at 713 (emphasis added).

⁶⁶ 601 N.E.2d 225 (Ohio Ct. App. 1992).

⁶⁷ *Id.* at 226.

⁶⁸ *Id.* at 227.

[his] head against a stationary beam, causing personal injuries.”⁶⁹ The court held that, “[a] summary judgment finding [of] assumption of the risk is inappropriate upon these disputed facts [as] supported by both the syllabus in *Cremeans* and the rationale of a majority of its justices.”⁷⁰ The court reasoned that Justice Wright’s opinion in *Cremeans* served as the pivotal or swing opinion, and as such, ruled in accordance with that opinion in stating that “questions of assumption of the risk should generally be left to the jury.”⁷¹ Thus, the court limited the *Cremeans* holding by finding that a jury could determine that a worker assumed the risk of injuries incurred as a result of a defective product encountered in the normal performance of his or her job duties.

Syler notwithstanding, Ohio courts seem willing to continue the trend of abolishing the defense of assumption of the risk in *all* employment settings.

V. THE ELEMENTS OF ASSUMPTION OF THE RISK

The defense of assumption of the risk “consists in voluntarily and unreasonably proceeding to encounter a known risk posed by a defective product.”⁷² In this section, the elements “voluntarily,” “unreasonably,” and “known” will be examined.

Section 496E(1) of the *Restatement* provides the general rule: “A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk.”⁷³ This section defines “voluntary” in the negative in subsection two by explaining that

[t]he plaintiff’s acceptance of a risk is not voluntary if the defendant’s tortious conduct has left him no reasonable alternative course of conduct in order to (a) avert harm to himself or another, or (b) exercise or protect a right or privilege of which the defendant has no right to deprive him.⁷⁴

In comment c to section 496E of the *Restatement*, the concept of “voluntary” is further described in light of the defendant’s conduct as

⁶⁹ *Id.*

⁷⁰ *Id.* at 229.

⁷¹ *Id.*

⁷² *Onderko v. Richmond Mfg. Co.*, 511 N.E.2d 388, 390 (Ohio 1987). Because section 2315.20 of the Ohio Revised Code does not define assumption of the risk, the *Onderko* definition will be used because the Tort Reform Act is generally viewed as codifying the common law. See *LOWE*, *supra* note 21.

⁷³ RESTATEMENT (SECOND) OF TORTS § 496E (1965).

⁷⁴ *Id.*

follows: "[A] defendant who, by his own wrong, has compelled the plaintiff to choose between two evils cannot be permitted to say that the plaintiff is barred from recovery because he has made the choice."⁷⁵ Therefore, where the defendant-manufacturer has breached its duty to place a product free from defects into the stream of commerce, it has "compelled" the plaintiff-worker to choose between the "evils" of confrontation of the defective product or loss of job.

The defendant-manufacturer may assert that the plaintiff-worker need not seek and maintain employment in a position that exposes him or her to defective products. This argument is without merit, however, because the final sentence in comment c states, "[t]he existence of an alternative course of conduct which would avert the harm, or protect the right or privilege, does *not* make the plaintiff's choice voluntary, if the alternative is one which he can not reasonably be required to accept."⁷⁶

In *Hull v. Merck & Co.*,⁷⁷ the United States Court of Appeals for the Eleventh Circuit defined the element of "voluntariness" as a plaintiff acting "without restriction from his freedom of choice either by the circumstances or by coercion"⁷⁸ The key to this definition turns on the use of the words "by coercion." As one commentator explained, "in an environment virtually requiring wage-based employment, voluntary assumption of risk is necessarily severely constrained by *economic coercion*."⁷⁹ This is precisely the type of coercion the Supreme Court of Ohio was faced with in the *Cremeans* decision, and which led the court to abolish the defense of assumption of the risk in the employment setting. Specifically, the court stated that "the economic pressures associated with the reality of today's workplace inevitably came to bear on Cremeans' decision to encounter the risk."⁸⁰ Other courts have shown the same sensitivity to the worker's lack of choice regarding confrontation of a defective product or loss of employment.⁸¹

An examination of the second element, that the confrontation of the risk must be "unreasonable," will be deferred until after the "knowledge" element is explored. This is because the question of unreasonable

⁷⁵ *Id.*

⁷⁶ *Id.* (emphasis added). The concept of "reasonableness" will be examined below.

⁷⁷ 758 F.2d 1474 (11th Cir. 1985).

⁷⁸ *Id.* at 1476.

⁷⁹ Jane P. North, *Employees' Assumption of Risk: Real or Illusory Choice?*, 52 TENN. L. REV. 35, 62 (1984) (emphasis added).

⁸⁰ *Cremeans v. Willmar Henderson Mfg. Co.*, 566 N.E.2d 1203, 1208 (Ohio 1991).

⁸¹ See, e.g., *Norris v. ACF Indus.*, 609 F. Supp. 549 (D. W.Va. 1985); *Baker Pac. Corp. v. Suttles*, 269 Cal. Rptr. 709 (Ct. App. 1990); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 68, at 492 & n.22 (5th ed. 1984).

assumption of the risk is intimately bound up with the question of whether the plaintiff-worker had knowledge of the defect in the product.

Section 496D of the *Restatement* sets forth the general rule: "[A] plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character."⁸² Comments b and c to this section expound upon the rule in stating that the plaintiff "must not only be aware of the facts which create the danger, but must also appreciate the danger itself and the nature, character, and extent which make it unreasonable,"⁸³ and this must be determined in light of "what the particular plaintiff in fact sees, knows, understands and appreciates."⁸⁴ Thus, a subjective standard should be applied.⁸⁵

An additional component to the "knowledge" element turns on whether "particularized knowledge of the specific defect" is required.⁸⁶ Most commentators suggest that the law requires the plaintiff to have "had actual knowledge of the particular risk, or the specific danger, which resulted in injury, [while] [k]nowledge of general risks, those merely within the range of possibility, is not sufficient."⁸⁷

With respect to defective products causing⁸⁸ long-term progressive diseases such as asbestosis and related diseases, the requirements of the knowledge element become ambiguous. The plaintiff-worker is faced with an invisible agent rather than a mechanical one, and the chances of contracting the disease are not certain.⁸⁹ Thus, the plaintiff-worker cannot actually see the defective product, nor does the plaintiff-worker know if he or she will be part of the percentage of workers that will in fact contract the disease;⁹⁰ hence, the subjective standard may not be met.

The aforementioned elements of "voluntariness" and "knowledge" both figure into the determination of "unreasonableness." This particular element focuses on the plaintiff-worker's "negligen[ce]" in choosing to

⁸² RESTATEMENT (SECOND) OF TORTS § 496D (1965).

⁸³ *Id.* at cmt. b.

⁸⁴ *Id.* at cmt. c.

⁸⁵ See *Skonberg v. Owens-Corning Fiberglass Corp.*, 576 N.E.2d 28 (Ill. App. Ct. 1991).

⁸⁶ KEETON ET AL., *supra* note 81, § 68 n.68; see also *Hovanec v. Harnischfeger Corp.*, 807 F.2d 448, 451 (5th Cir. 1987).

⁸⁷ Paul Rosenlund & Paul Killion, *Once a Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California*, 20 U.S.F. L. REV. 225, 250-51 (1986). But see *Hull v. Merck & Co.*, 758 F.2d 1474, 1477 (11th Cir. 1985).

⁸⁸ The causation issue is beyond the scope of this Comment.

⁸⁹ North, *supra* note 79, at n.159.

⁹⁰ *Id.*

encounter the risk,"⁹¹ and therefore, necessarily turns on the plaintiff-worker's fault. The plaintiff-worker can only be at fault if he or she knew of the particular risk and voluntarily encountered it. Thus, even if the plaintiff-worker knows that exposure to a toxic substance can cause death, he or she will be "at fault" only if encountering the risk was "voluntary," that is, not "economically coerced." For example, in the case of workers exposed to defective products that cause occupational diseases, "[i]t may not be at all unreasonable for workers to assume that they will not be in that percentage of the workforce that will be affected by long-term exposure to a toxic substance,"⁹² especially in the context of economic pressures to obtain and maintain employment.

This particular element, which focuses on the plaintiff's fault, presents a contradiction in light of the theory behind *strict* products liability. Strict products liability was judicially developed to disregard the issue of fault and look instead to the defectiveness of the product, not the plaintiff's conduct. On the other hand, the defense of assumption of the risk encompasses the idea that the plaintiff voluntarily confronted a known risk. Thus,

[s]ince the plaintiff [is] at fault, he is barred from recovery. For this defense to make sense and be fair, the plaintiff should only be barred if his fault, his assumption of the risk, is greater than the liability of the manufacturer . . . [however,] this would create a comparative fault analysis[, which] the Ohio Supreme Court rejected . . . in *Bowling*.⁹³

Consequently, the final part of this paper will examine the asbestos remover and assumption of the risk in terms only of the plaintiff-remover's voluntary confrontation of a known risk.

VI. THE ASBESTOS REMOVER, ASSUMPTION OF THE RISK, AND *CREMEANS*

Most of the cases referred to above dealt with fact patterns in which the employee sustained an immediate injury from the use of a defective product in carrying out his or her job duties.⁹⁴ With respect to asbestos

⁹¹ KEETON ET AL., *supra* note 81, § 68.

⁹² North, *supra* note 79, at n.159.

⁹³ Gregory Lambert, Note, *Tort Law: What Defenses are there to a Products Liability Action in Ohio?*, 15 U. DAYTON L. REV. 173, 185 (1989).

⁹⁴ See *Bowling v. Heil Co.*, 511 N.E.2d 373 (Ohio 1987) (employee was killed by defective dump truck); *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814 (Ohio), *cert. denied*, 459 U.S. 857 (1982) (employee lost two fingers while operating defective punch press);

removers, however, the "compensable harm is a long-term progressive disease, marked by a long latency period and irreversible progression of illness after the onset of the disease."⁹⁵ Nevertheless, both situations involve a defective product, "encountered in the normal performance of the employee's required job duties," that causes the employee injury. Thus, the question arises, would *Cremeans* apply to a situation where an asbestos remover contracts asbestosis or a related disease in the normal performance of his or her employment?

Examining an asbestos remover's claim from its logical beginnings, it must be determined whether asbestos is a defective product when accompanied by an adequate warning.⁹⁶ In order to subject the manufacturer of a defective product to strict products liability, the consumer expectation or risk/benefit test must be applied. The *Knitz* case and section 2307.76 of the Ohio Revised Code set forth these two tests and explain that if the product fails *either* test, it is defective and the manufacturer is subject to strict products liability.⁹⁷ Consequently, if an "ordinary consumer," which arguably does not include an asbestos remover, would not expect to develop a fatal disease as a result of exposure to asbestos, then the asbestos manufacturer would be subject to strict liability. Under the risk/benefit test, if the risks of the product outweigh its benefits, then the product is deemed defective. Although at first blush this seems to apply to asbestos removers, such applicability depends upon the extent to which courts will be willing to allow strict products liability actions to be brought by asbestos removers. Asbestos removers are not consumers, users, or purchasers, the usual proponents of a strict products liability cause of action.

An alternative argument to prove that asbestos is a defective product for a "remover case" can be made as follows: because the federal and state legislatures have deemed asbestos so hazardous as to mandate its removal from public, commercial, and residential buildings, it is *per se* a defective product, hence subjecting asbestos manufacturers to strict liability.⁹⁸

After the plaintiff-remover establishes asbestos as a defective product subject to strict products liability, the defendant-asbestos manufacturer will

Prentiss v. Kirtz, 374 N.E.2d 429 (Ohio Ct. App. 1977) (employee lost fingers while operating a grinding wheel).

⁹⁵ North, *supra* note 79, at 61 n.159.

⁹⁶ Workers who were exposed to asbestos from 1940 to the early 1970s have shown asbestos to be a defective product subject to *Restatement* section 402A or Ohio Revised Code section 2307.71 et seq. (strict liability employing a failure to warn theory).

⁹⁷ *Knitz*, 432 N.E.2d 814; OHIO REV. CODE ANN. § 2307.75(A)(1), (2) (Anderson 1988).

⁹⁸ See 15 U.S.C. §§ 2641-55 (1988); 20 U.S.C. § 4011-22 (1988); OHIO REV. CODE ANN. § 3710.01 (Anderson 1988).

assert that the plaintiff-remover assumed the risk. The defendant-asbestos manufacturer will argue that the plaintiff-remover knows that exposure to asbestos can lead to early death.

The plaintiff-remover may rebut with the argument that even if he or she possesses knowledge of the possibility of contracting asbestos-related diseases upon exposure, researchers can predict only that a certain percentage of workers in the industry will contract the disease.⁹⁹ The United States Department of Labor estimates that of the roughly 700,000 workers who suffer from long-term total disability caused by occupational diseases¹⁰⁰ annually, 85,000 are victims of asbestos-related diseases alone.¹⁰¹ One expert predicts that two-fifths of workers exposed to asbestos will die from such exposure.¹⁰² Although these statistics deal with the industrial worker who was exposed to asbestos between the years of 1940 to the early 1970s, they are still relevant because even though removers are required by law to wear certain protective equipment,¹⁰³ OSHA acknowledges that respirator "filter efficiency for asbestos has not been thoroughly tested."¹⁰⁴

Assuming however, that the plaintiff-remover is found to possess the requisite knowledge of the particular risk of exposure to asbestos, namely, early death, the next argument concerns the question of "voluntariness." The plaintiff-remover will assert that his or her acceptance and maintenance of employment was compelled by economic pressures.

As explained in Part V above, courts have rationalized that by mere acceptance of employment and economic compulsion to remain employed, the worker can no longer "voluntarily" assume the risk of a known

⁹⁹ North, *supra* note 79, at n.159.

¹⁰⁰ The Supreme Court of Ohio ruled that

[a]n occupational disease is compensable under *Ohio Revised Code* section 4123.68(BB) where the following criteria exist: (1) the disease is contracted in the course of employment; (2) the disease is peculiar to the claimant's employment by its causes and the characteristics of its manifestation or conditions of employment result in a hazard which distinguishes the employment generally; and (3) the employment creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

State *ex rel.* Ohio Bell Tel. Co. v. Krise, 327 N.E.2d 756, 758 (Ohio 1975).

¹⁰¹ Viscusi, *supra* note 44, at 126-27.

¹⁰² DANIEL BERMAN, DEATH ON THE JOB: OCCUPATIONAL HEALTH AND SAFETY STRUGGLES IN THE UNITED STATES 84 (1978).

¹⁰³ See, e.g., OHIO REV. CODE ANN. § 3710.08 (Anderson 1988).

¹⁰⁴ 49 Fed. Reg. 14,125 (1984) (to be codified at 29 C.F.R. parts 1910 and 1926).

danger.¹⁰⁵ The question remains, however, can the asbestos remover successfully argue that he or she did not "voluntarily" assume the risk of a known danger?

A leading commentator in the field believes that the asbestos-remover can successfully argue that he or she did not "voluntarily" assume the risk.¹⁰⁶ Specifically, Lloyd A. Fox suggests that "where the plaintiff would have to give up a job in order to avoid exposure to asbestos . . . [this would] negate any attempt to use the assumption of the risk defense."¹⁰⁷

Section 523 of the *Restatement*, which deals with "assumption of the risk of harm from an abnormally dangerous activity," adopts in comment f the rule that the plaintiff "does not assume the risk when the defendant's conduct has forced upon him the choice of two unreasonable alternatives."¹⁰⁸ Section 496E comment c of the *Restatement* explains further that "[a] defendant who, by his own wrong, has compelled the plaintiff to choose between two evils cannot be permitted to say that the plaintiff is barred from recovery because he has made the choice."¹⁰⁹

Applying these *Restatement* sections to the asbestos remover's claim that he or she did not "voluntarily" assume the risk, it follows that because the defendant-manufacturer placed a defective product into the stream of commerce, it cannot now force the plaintiff-remover to "choose between two evils"—unemployment or possible contraction of an asbestos-related disease—and then claim that the plaintiff-remover should be barred from recovery.

In addition, the argument that the asbestos remover is compensated for the risks associated with such employment is not convincing because asbestos removers will probably fail to demand a higher wage. Further, the asbestos remover will also probably fail to demand more employer safeguards against the health risks associated with asbestos because of the long latency period and difficulty in tracing the causative agent. Lastly, asbestos removers may believe that the protective equipment they are mandated to wear actually does protect them from exposure to the toxic agent, which OSHA acknowledges may not be true.

In *Cremeans*, the Ohio Supreme Court adopted the economic compulsion rationale and held that unless an employee intentionally causes his or her own injury, the "employee does not voluntarily or unreasonably

¹⁰⁵ *Id. See, e.g.,* International Union v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (female worker chose to undergo sterilization in order to retain employment).

¹⁰⁶ LLOYD A. FOX, ASBESTOS ABATEMENT & REMOVAL: LEGAL CONSIDERATIONS AND PLANNING 26 (1985).

¹⁰⁷ *Id.*

¹⁰⁸ RESTATEMENT (SECOND) OF TORTS § 523 and cmt. f (1965).

¹⁰⁹ *Id.* § 496E cmt. c.

assume the risk of injury which occurs in the normal performance of his or her required job duties and responsibilities."¹¹⁰

VII. CONCLUSION

The dangers of exposure to asbestos date back 2000 years, yet asbestos abatement was not mandated until the late 1980s.¹¹¹ Mandatory asbestos abatement followed on the heels of court decisions that found asbestos manufacturers subject to strict products liability.

Asbestos manufacturers asserted the defense of assumption of the risk on the part of the worker in an effort to avoid liability. Courts following the laissez-faire economic philosophy of the early twentieth century ruled that the worker had assumed the risk of injury from exposure to asbestos.¹¹² The Ohio Supreme Court's decision in *Cremeans v. Willmar Henderson Mfg. Co.*, however, appears to have closed off the defense of assumption of the risk when the court held that "[a]n employee does not voluntarily or unreasonably assume the risk of injury which occurs in the course of his or her employment when that risk must be encountered in the normal performance of his or her job duties and responsibilities."¹¹³ Similar to the situation that Cremeans faced, operating a front-loader that he knew posed a substantial risk of harm, the asbestos remover possesses awareness of the substantial dangers of exposure to asbestos. Nevertheless, the asbestos remover, like Cremeans, feels economically compelled to perform his or her job duties in spite of the substantial risk of harm.

In adopting such a holding, the Supreme Court of Ohio declared it unjust for the worker to absorb the cost of his or her injury alone. Thus, is it not fairer to shift the costs, as the court did in *Cremeans*, of asbestos removal to society as a whole, rather than place the entire burden on those persons who feel economically compelled to seek and maintain employment as asbestos removers?

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¹¹⁰ *Cremeans v. Willmar Henderson Mfg. Co.*, 566 N.E.2d 1203 (Ohio 1991).

¹¹¹ See *supra* note 8.

¹¹² See *Cordingley v. Bell Asbestos Mines, Ltd.*, 3 Asbestos Lit. Rep. (Andrews) 6000 & 6027 (Pa. Commw. Ct. 1983), *aff'd* 503 A.2d 53 (Pa. Super. Ct. 1985).

¹¹³ 566 N.E.2d 1203, 1207 (Ohio 1991).

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